Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000641-001 DT 01/04/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA ANDREW M DAVIDSON

v.

CHRISTOPHER CODY LILLIS (001) RICHARD G NEUHEISEL

REMAND DESK-LCA-CCC
TEMPE MUNICIPAL COURT

MINUTE ENTRY

**Lower Court Case Number 10–027004–1.**

Defendant-Appellant Christopher Cody Lillis (Defendant) has filed a Petition To Review Court's Decision Based on Alleged Error, and asks this Court to reverse its prior Decision. For the following reasons, this Court denies relief. A review of the record in this matter shows the following.

I. FACTUAL BACKGROUND.

Defendant was charged in Tempe Municipal Court with driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and driving under the extreme influence, A.R.S. § 28–1382(A)(1) & (A)(2). Prior to trial, Defendant filed a combined Motion To Dismiss DUI Charges and Motion To Suppress Evidence alleging his consent to take the BAC test was not voluntary because the officer did not read to him the *Miranda* warnings prior to asking him if he would submit to the BAC test. On December 7, 2010, the parties submitted this combined Motion to the trial court on the police report. That report showed the following:

On May 6, 2010, at about 2:00 a.m., Officer Hector Encinas saw a vehicle make a right turn through a red light without stopping. Officer Encinas stopped that vehicle and contacted the driver, whom he identified as Defendant. Officer Encinas noted Defendant had bloodshot and watery eyes, slurred speech, and the odor of alcohol on his breath. Officer Encinas asked Defendant if he had anything to drink before driving, and Defendant said he did not. Officer Encinas had Defendant perform field sobriety tests, and because Defendant showed signs of impairment, Officer Encinas placed him under arrest, which was at 2:17 a.m. At 2:45 a.m., Officer Encinas read to Defendant the Admin Per Se/Implied Consent Affidavit, and Defendant agreed to take a

breath test. The results of that test gave readings for Defendant of a BAC of 0.211 at 2:50 a.m. and a BAC of 0.204 at 2:56 a.m. At 3:07 a.m., Officer Encinas read to Defendant the *Miranda* warnings; Defendant said he understood them and agreed to answer questions. At 3:15 a.m., Defendant was released from custody.

Based upon that report and the arguments of counsel, the trial court denied Defendant's combined Motion To Dismiss DUI Charges and Motion To Suppress Evidence. On December 17, 2010, the parties submitted the matter to the trial court on a stipulated record, and the trial court found Defendant guilty of driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and driving under the extreme influence, A.R.S. § 28–1382(A)(1) & (A)(2). On that same day, Defendant filed a timely notice of appeal.

On January 17, 2012, this Court filed its Decision affirming the judgment and sentence. On January 31, Defendant filed a Motion for Rehearing/Reconsideration. On April 27, this Court issued its Ruling denying Defendant's Motion for Rehearing/Reconsideration. On June 12, Defendant's attorney filed the Petition To Review Court's Decision Based on Alleged Error. On July 25, the State filed its Response to Defendant's Petition To Review LCA Decision. On October 11, the Tempe Municipal Court filed with this Court a copy of the Compact Disk of the proceedings below, and on November 6, 2012, this matter was assigned for ruling.

II. DISCUSSION.

Defendant's attorney has filed a document entitled Petition To Review Court's Decision Based on Alleged Error, which he states is pursuant to Rule 32 of the Arizona Rules of Criminal Procedure. Rule 32.1 gives a defendant the right to institute a proceeding to secure appropriate relief; Rule 32.3 provides that proceeding is part of the original action and not a separate action; Rule 32.4(a) provides the proceeding is commenced by filing a timely notice of post-conviction relief with the court in which the conviction occurred (i.e., the trial court); and Rule 32.9 provides any party aggrieved may petition the appropriate appellate court for review of the action of the trial court. Thus, before a party may file a petition for review under Rule 32, the party must first have filed a petition for post-conviction relief with the trial court and received a ruling from that court. In the present matter, Defendant has not filed a petition for post-conviction relief with the trial court and thus has not obtained any ruling from that court for this Court to review. Rule 32 is therefore not the proper procedural vehicle to obtain the relief Defendant wants.

It appears Defendant's attorney wants this Court to review its own Decision, the one this Court issued April 27, 2012, which addressed the merits of Defendant's claims. Most attorneys would seek to accomplish this by filing a motion for rehearing/reconsideration, which Defendant's attorney knows how to do, having previously file one in this matter on January 31, 2012. Because Defendant's attorney is asking this Court to reconsider its Decision of April 27, 2012, this Court will treat the Petition To Review Court's Decision Based on Alleged Error as a motion for rehearing/reconsideration.

Defendant's attorney states the issues as follows:

> The motion submits Defendant did not know he was entitled to an attomey and Defendant did not give his clear consent and his consent was obtained by coercion. See page 2 of Defendant's Motion [dated October 25, 2010, and filed in the trial court] attached hereto as Exhibit 1.
>
> Thus, it is clear Defendant though his counsel made a claim that the administered BAC test was not voluntary—it was obtained by coercion.
>
> Based on the above, this Court's decision was based on obvious factual error and needs to be reversed.

For two reasons, this Court concludes Defendant is not entitled to relief on these claims.

First, Defendant appears to be claiming the officers had some obligation to inform him of his right to counsel before he made his decision whether to consent to the breath test. The Arizona Court of Appeals has, however, already rejected that claim:

> The issue before us is whether the police had an affirmative duty to give *Miranda* warnings to defendant prior to requesting that she submit to the field sobriety test and the intoxilyzer tests. We hold that no such duty existed.

*State v. Lee*, 184 Ariz. 230, 232, 908 P.2d 44, 46 (Ct. App. 1995).

> Defendant argues that immediately upon being arrested, defendants must be told of their right to counsel and that a failure to do so results in violation of the Sixth Amendment and the Arizona Constitution.
>
> . . . .
>
> Here, absent a request for counsel, absent the administration of a chemical breath test, and absent police interrogation, defendant seeks to suppress evidence of the results of the field sobriety tests and her refusal to take the intoxilyzer based solely on the fact she was not advised of her right to counsel. We decline to impose an affirmative duty on the State, under these circumstances, to advise defendants of their right to counsel.

*Lee*, 184 Ariz. at 234, 908 P.2d at 48. Thus, the officers had no duty to advise Defendant of any right to counsel.

Defendant seems to be arguing that, even though the officers had no duty to advise him of a right to counsel, their failure to do so made his consent to take the BAC test involuntary. Defendant is essentially arguing in a circle because, if failure to advise a defendant of the right to counsel made any consent involuntary, the police would have to advise of the right to counsel in order to make any subsequent test admissible, which would then mean the police had an affirmative duty to advise a defendant of the right to counsel, a position the court rejected in *Lee*. This Court thus concludes the failure to advise Defendant of the right to counsel did not make his consent involuntary.

Second, Defendant appears to be claiming his consent was coerced because the officers told him he would lose his driver's license for 12 months if he did not consent to the BAC test. The applicable statute requires, however, that the officers advise a person arrested of the consequences of a refusal to submit to a BAC test:

> After an arrest a violator shall be requested to submit to and successfully complete any test or tests prescribed by subsection A of this section, and if the violator refuses the violator shall be informed that the violator's license or permit to drive will be suspended or denied for 12 months . . . unless the violator expressly agrees to submit to and successfully completes the test or tests. . . .

A.R.S. § 28–1321(B). Thus, if Officer Encinas had failed to advise Defendant he would lose his license for 12 months if he refused to take the BAC test, Defendant would have moved to suppress the results of the BAC test as a result of the officer's failure to comply with this statutory duty.

Further, if the police did not inform a defendant of this result of a refusal to take a BAC test and the defendant then refused to take the test, the defendant would claim the refusal was not knowingly and intelligently made because the defendant did not know of the statutorily-mandated result of that refusal. Thus, in order for a court to find that a defendant made a knowing, voluntary, and intelligent decision whether or not to take a BAC test, the police must have advised the defendant of the consequences of a refusal.

This Court acknowledges that advising a defendant of the alternatives, either take the test or lose the driver's license for 12 months, gives a defendant a hard choice. But merely because a choice is a hard choice does not mean it is a coerced choice.

Moreover, Defendant never testified before the trial court and thus has made no claim he was coerced into taking the BAC test. Defendant's attorney argues Defendant was coerced, but as jurors are instructed, what the attorneys say and argue is not evidence. For all we know, Defendant may have willingly taken the BAC test in order to support his statement to Officer Encinas that he had not had anything to drink before driving.

Next, Defendant's attorney notes he filed a Motion To Strike and Dismiss DUI Charges Against Defendant based on his claim the State did not file its Appellee's Memorandum within the time limits, and further notes this Court did not say anything about that motion. Defendant's attorney is correct in that this Court did not explicitly say anything about that motion. Because this Court affirmed Defendant's conviction, however, this Court implicitly denied that motion. Defendant's attorney apparently wants something explicit, so this Court will make it explicit.

The State responded to Defendant's Motion To Strike and Dismiss DUI Charges Against Defendant and contended it filed a motion for extension that it contends the trial court granted. Thus, it appears the State filed its Memorandum in a timely manner.

Moreover, even assuming the State's Memorandum was untimely, as the State notes, the failure to file an appellee's memorandum does not constitute a confession of error. The Arizona appellate courts have express the position that matters should be resolved on the merits when possible and not on the basis of default, and this Court agrees with that position. This Court has therefore resolved this matter on the merits. Thus, to the extent Defendant's attorney is asking this Court to dismiss the DUI charges against Defendant, this Court denies that motion.

III. CONCLUSION.

Based on the foregoing, this Court concludes defendant's attorney has not provided any viable reasons for this Court to reverse its April 27, 2012, Decision.

**IT IS THEREFORE ORDERED** denying Defendant's Petition To Review Court's Decision Based on Alleged Error.

**IT IS FURTHER ORDERED** denying Defendant's Motion To Strike and Dismiss DUI Charges Against Defendant.

**IT IS FURTHER ORDERED** affirming this Court's previous order remanding this matter to the Tempe Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

*/s/ Crane McClennen*
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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